NGIENG SHIAT YEN

v.

T'EN JIT HING

HIGH COURT SABAH & SARAWAK, MIRI
SULAIMAN DAUD JC
[CIVIL APPEAL NO: 11-02-99(MR)]
27 OCTOBER 2000

FAMILY LAW: *Domestic violence - Protection orders - Application for - When may protection orders be granted - Conditions to be satisfied - Whether there first must be pending investigations by police following allegation of domestic violence - Domestic Violence Act 1994, ss. 4, 5, 6, 12, 13*

By an *ex parte* application, the applicant (now the appellant) applied for protection orders under ss. 4, 5 and 6 of the Domestic Violence Act 1994 ('the DVA') namely that the respondent be restrained from using domestic violence against or making personal contact with her and that she be granted the exclusive occupation of their shared residence ('the shared residence'). The magistrate made an order in terms of the prayer sought ('the *ex parte* order'). The respondent applied for an order that the *ex parte* order be set aside on the ground that the said order was a nullity and was made in contravention of the DVA. The magistrate set aside the *ex parte* order on the ground that a protection order under ss. 4, 5 or 6 of the DVA can only be granted if and only where there is a pending investigation or proceedings involving a complainant of domestic violence. The appellant now appealed. The issues for consideration dealt with: (a) the construction of specific sections in the DVA, namely ss. 4, 5, 12 and 13, *ie*, whether these sections can be invoked only when there are pending investigations following information relating to the commission of an offence involving domestic violence; and (b) whether the magistrate was justified in awarding costs to the respondent.

Held:

[1] Sections 4 and 5 of the DVA only provide for the powers of the court to issue the order to which it relates under the circumstances specified therein without setting out the procedure for its issuance. It is also apparent from the clear and unambiguous language thereof that the said sections provide for two different and distinct orders which can be obtained separately, independent of each other under the circumstances and for the purpose specified in relation thereto.

[1a] Section 4 of the DVA should be read together with s. 12 where s. 4 provides for the powers of the court to issue the interim protection order while s. 12 provides for the circumstances when such order may be

sought. By reading the two sections together, the construction that can be made is that an interim protection order may only be issued by the court if there is pending investigation by the police following an investigation of domestic violence.

[2] Likewise, reading ss. 5 and 13 of the DVA together, there can be no doubt from both the provisions that a protection order may only be issued under s. 5 in circumstances where there are criminal proceedings against the person in respect of whom the protection is sought and secondly where the criminal proceedings relate to a charge for an offence involving domestic violence and thirdly where the protection order is issued as conditions for such person's release on bail or upon the compounding of the offence.

[3] On the issue of costs, since the appellant had wrongly commenced this action by way of civil proceedings against the respondent and the respondent had in fact incurred costs and expenses in defending this action, the magistrate was therefore justified in awarding costs to the respondent.

[Appeal dismissed.]

Case(s) referred to:
Creswell v. BOC Ltd [1980] 3 All ER 443 ***(refd)***
Davies v. Johnson [1978] 1 All ER 1132 ***(refd)***
Harkness v. Bell's Asbestos & Engineering Ltd [1967] 2 QB 729 ***(refd)***

Legislation referred to:
Domestic Violence Act 1994, ss. 2, 3, 4, 5, 6, 12, 13, 14, 15, 16, 18, 20
Penal Code, s. 40
Subordinate Courts Rules 1980, O. 2 rr. 1, 2

Other source(s) referred to:
Black's Law Dictionary, 7th edn

For the appellant - Bong Ah Loi; M/s Bong & Co
For the respondent - SH Lim; M/s SH Lim & Co

Reported by Mariette Peters-Goh

JUDGMENT

Sulaiman Daud JC:

This is an appeal against the decision of the learned magistrate in setting aside the *ex parte* order dated 7 October 1999 granted to the appellant pursuant to an *ex parte* originating application. By the *ex parte* order the respondent is restrained from using domestic violence against the appellant.

Factual Background

The factual background which led to this appeal can be stated quite shortly. By an *ex parte* originating application dated 21 November 1998 the appellant, being the applicant therein, applied for protection orders under ss. 4, 5 and 6 of the Domestic Violence Act 1994 (hereinafter referred to as "the Act"; and reference to a section herein shall be reference to a section of the Act) that the respondent be restrained from using domestic violence against or making personal contact with her and that she be granted the exclusive occupation of their shared residence at No 25 Jalan Rejang 20, Taman Tunku, Miri ("shared residence").

According to the appellant's affidavit she was married to the respondent in 1986 and they have three children by the marriage, the eldest being eight years old and the youngest three months old. Approximately a year after the marriage the respondent started beating her up and on one occasion following an argument between them the respondent locked her and their three children outside their shared residence. Things got out of hand when an attempt made by the appellant to resolve their differences turned into a fight where she was kicked and beaten up by the respondent for which she sustained minor injuries which require medical treatment.

The learned magistrate who heard the *ex parte* application made an order in term of the prayer sought.

The respondent, upon service of the *ex parte* order to him, applied under O. 2 r. 1 and 2 of the Subordinate Court Rules 1980 for an order that the said *ex parte* order be set aside on the ground, among others, that the said order is a nullity and was made in contravention of the provisions of the Act. On 5 March 2000 the learned magistrate set aside the said *ex parte* order on the ground that a protection order under s. 4, 5 or 6 can only be granted if and only where there is a pendency of investigations or proceedings involving a complaint of domestic violence. He also awarded cost to the respondent. Being dissatisfied with the said decision the appellant appealed.

Issuance Of Protection Order

I will firstly deal with the first ground of appeal which relate to the issuance of a protection order under the Domestic Violence Act 1994. It is obvious from the appellant's application that the protection order sought in this action is the order provided under s. 5. In this regard, the learned counsel for the appellant submitted that ss. 4, 5 and 6 cannot be read as though the said ss. 5 and 6 can only be invoked after the condition set out in s. 4 has been satisfied, that is there must be a pending investigation following an information relating to the commission of an offence involving domestic violence.

According to the learned counsel the said ss. 4 and 5 should be read disjunctively and that the said sections provide for two different and separate remedies.

With regard to s. 5, the learned counsel contended that reference to the expression "proceedings involving complaint involving domestic violence" therein must not be construed as related to criminal prosecution only but also include proceedings for the issuance of the protection order as instituted by the appellant in this action. In support thereof he referred to the view expressed by Lord Denning MR in the case of *Harkness v. Bell's Asbestos & Engineering Ltd* [1967] 2 QB 729 that any application to court, however informal, is a proceeding. The learned counsel also referred to *Black's Law Dictionary*, 7th edn, where it is stated that the term "proceedings" as applied to action includes the institution of the action.

The learned counsel for the respondent on the other hand submitted that to invoke the provisions of the Act there must firstly be a report of an offence involving domestic violence to the enforcement officer and the interim protection order under s. 4 may only be issued during the pendency of the investigation into such report. He further submitted that a protection order under s. 5 may only be issued in criminal proceedings where the person in respect of whom the investigation is carried out is charged for the offence.

Before embarking to deal with the related issues, it is convenient at this stage to refer to the relevant provisions of the Act to see if the questions raised by both counsels can be answered by the language of the Act itself. The object for which the Act is enacted, as provided in the long title thereto, is to make provision for legal protection in situation of domestic violence and matters incidental thereto. In interpreting the provisions of the Act we must not lose sight of the provisions of s. 3 thereof which expressly provide that the Act shall be read together with the provisions of the Penal Code. The other provisions of the Act which in my view are directly related to the issuance of protection orders thereunder are ss. 4, 5, 6, 12, 13, 14 and 15 thereof. Sections 4 and 5 which respectively provide for the powers of the court to issue interim protection order and protection order read as follows:

> 4(1) The court may, during the pendency of investigations relating to the commission of an offence involving domestic violence, issue an interim protection order prohibiting the person against whom the order is made from using domestic violence against his or her spouse or former spouse or a child or an incapacitated adult or any other member of the family, as the case may be, as specified in the order.
>
> (2) An interim protection order shall cease to have effect upon the completion of the investigations.

5(1) The court may, in proceedings involving a complaint of domestic violence, issue any one or more of the following protection orders:

(a) a protection order restraining the person against whom the order is made from using domestic violence against the complainant;

(b) a protection order restraining the person against whom the order is made from using domestic violence against the child;

(c) a protection order restraining the person against whom the order is made from using domestic violence against the incapacitated adult.

Section 6 provides for the various orders that may be included in the protection order issued under s. 5 if the court is satisfied on the balance of probabilities that it is necessary for the protection or personal safety of the complainant.

It is observed that the said ss. 4 and 5 only provide for the powers of the court to issue the order to which it relates under the circumstances specified therein without setting out the procedure for its issuance. It is also apparent from the clear and unambiguous language thereof that the said sections provide for two different and distinct orders which can be obtained separately independent of each other under the circumstances and for the purpose specified in relation thereto. Having said so I shall now come to the crux of the issue in this appeal, that is whether reference in sub-s. 5(1) to the expression "in proceedings involving domestic violence" as a requirement for the issuance of a protection order thereunder relate to criminal proceedings only. In my view the answer to this question can be found in Part IV of the Act, particularly in ss. 12, 13, and 14 thereof which read as follows:

PART IV
PROCEDURE ON PROTECTION ORDER

12. An interim protection order may be sought pending investigation by the police following an information relating to the commission of an offence involving domestic violence.

13. A protection order may be sought during any criminal proceedings under the Penal Code where the accused is charged with an offence committed under the circumstances that falls within the definition of "domestic violence",:

(a) as a condition of the accused's release on bail or at any stage of the proceedings; or

(b) upon the compounding of such offence under s. 260 of the Criminal Procedure Code.

14. A complaint pursuant to this Act may be filed in any district where –

(a) the complainant resides;

(b) the offender resides;

(c) the alleged violence occurred;

(d) the victim is temporarily located,

and shall be heard by the court as soon as practicable.

Section 16 requires the registry of the court to maintain a record of all complaints filed pursuant to the Act, and all protection orders and an interim protection orders issued by the court under this Act. Section 20 of the Act empowers the Minister to prescribe by regulation the form of any report or complaint required pursuant to the Act and the procedure of the filing of any of such document in court.

Since the expression of "an offence involving domestic violence" as appearing in s. 12 and the expression "an offence committed under circumstances that falls within the definition of domestic violence" in s. 13 are not specifically defined or interpreted in the Act, for completeness it shall be necessary to firstly ascertained the meaning of those expressions. As the Act is to be read together with the Penal Code there can be no doubt that the word "offence" under the Act shall have the meaning assigned thereto under s. 40 of the Penal Code, and the expressions to "an offence involving domestic violence" and "an offence committed under circumstances that falls within the definition of domestic violence" must mean the offence under the Penal Code which is committed under the condition and circumstances as described in the definition of "domestic violence" in s. 2 of the Act.

In the interpretation of any written law the task of this court is to give effect to the intention of Parliament if that can be seen from the language of the statute (see *Davis v. Johnson* [1978] 1 All ER 1132), and the first canon of construction, that is the lateral rule, is to give the "ordinary and natural meaning" of the words contained in a statute (see *Creswell v. BOC Ltd* [1980] 3 All ER 443). In the case before me I am of the view that the language of the Act is clear and unambiguous and the intention of the legislature is apparent.

With regard to the issuance of an interim protection order I am of the view that s. 4 should be read together with s. 12 where the said s. 4 provides for the powers of the court to issue the interim protection order while s. 12 provides for the circumstances when such order may be sought. By reading the two sections together, in my opinion, the only construction that can be made is that an interim protection order may only be issued by the court if there is a pending investigation by the police following an investigation of domestic violence.

Likewise with regard to the issuance of a protection order under s. 5, in my opinion, the said s. 5 should be read together with s. 13 where s. 5 provides for the power of the court to issue such order while s. 13 provides for the circumstances under which such order may be sought. There can be no doubt from both the provisions that a protection order may only be issued under s. 5 in the following circumstances, that is to say firstly there must be a criminal proceedings against the person in respect of whom the protection is sought, secondly the criminal proceedings must relate to a charge for an offence involving domestic violence and thirdly the protection order is issued as condition for such person's release on bail or upon the compounding of the offence. Such a view is also consistent with the meaning given to "court" in s. 2 where proceedings involving allegations of domestic violence is referred to as criminal proceedings. For the reasons aforesaid I cannot agree with the contention of the learned counsel for the appellant that the word "proceedings" in the said s. 5 to be given wider interpretation so as to include the proceedings for the protection order as taken out by the appellant in this action. To give such a construction would, in my opinion, be contrary to the procedure and mechanism stipulated in the Act for the issuance of such protection order. The Act does not require a person seeking a protection order under s. 5 to commence any separate proceedings against the person in respect of whom the protection order is sought. Such protection order may be issued by the court in the course of the criminal proceedings against the accused if it is satisfied on the balance of probabilities that it is necessary for the protection and personal safety of the complainant.

Award Of Costs

As to the second ground of appeal which relate to costs, it is my finding that the appellant had wrongly commenced this action by way of civil proceedings against the respondent for the issuance of the protection order sought under the Act. For the reasons stated earlier no application as in the instant case is necessary for the issuance of a protection order under the Act. In my view the machinery of the Act shall be triggered upon complaint made under s. 14 of an offence involving domestic violence or upon information given under s. 18 of the commission of such offence. A complaint pursuant to the Act shall be filed in court in accordance with s. 14 at the places specified therein and shall be heard by the court as soon as practicable. Since the respondent had incurred costs and expenses in defending this action, it is my finding that the magistrate is justified in awarding costs to the respondent in setting aside the *ex parte* order.

For the foregoing reasons, I dismissed this appeal with costs to the respondent to be taxed unless otherwise agreed.